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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

FAIR POLITICAL PRACTICES COMMISSION,
QUENTIN L. KOPP AND ROSS JOHNSON,
Petitioners,
VS.
SERVICE EMPLOYEES INTERNATIONAL UNION, et al.,
Respondents.

Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is proof of discriminatory intent required to establish that Proposition 73's discriminatory fiscal year contribution limit scheme violates the First Amendment, where as the district court found, it gives incumbents a four to one fundraising advantage over challengers?

2. Did the circuit court err in affirming the district court's finding of fact that Proposition 73's fiscal year contribution limit scheme discriminated against challengers?

3. Is a statute that prohibits a candidate from transferring funds between the candidate's own committees an unconstitutional expenditure limit?

4. Is a statute that prohibits a candidate from transferring funds to other candidates' committees unconstitutional when the prohibition was designed to prevent circumvention of now invalidated contribution limits and when the statute forbids all transfers, not just transfers in excess of the contribution limits?

5. Is a statute that prohibits a candidate from supporting or opposing candidacies for elected office with campaign funds raised prior to January 1, 1989 an unconstitutional expenditure limit and are efforts to revive that statute now moot?

PARTIES

Respondents agree with the lists of parties of petitioner California Fair Political Practices Commission (hereinafter "FPPC") and petitioners California State Senator Quentin Kopp and State Assemblyman Ross Johnson (hereinafter "Kopp and Johnson") except to the extent that the FPPC identified petitioners Kopp and Johnson as respondents before this Court.

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OPINIONS BELOW

Respondents agree with both petitioners' explanations of the opinions below. The opinion of the Court of Appeals for the Ninth Circuit is reported at 955 F.2d 1312, and is reprinted in the Appendix to the Petition for Writ of Certiorari of FPPC (hereinafter "FPPC Pet.") at A-1 through A-36.

The opinions of the United States District Court for the Eastern District of California are reported at 721 F.Supp. 1172 and 747 F.Supp. 580, and are reprinted in the Appendix to the FPPC Petition at A-70 through A-88 and A-37 through A-69, respectively. Respondents use the page numbers in the Appendix to the FPPC Petition to cite these opinions in this brief.

JURISDICTION

Respondents agree with the statements of jurisdiction of both petitioners except to the extent that the FPPC states that respondents appealed the district court's decisions to the United States Court of Appeals for the Ninth Circuit.

STATUTES INVOLVED

Respondents agree with both petitioners' statements of the statutes involved.

STATEMENT OF THE CASE

Respondents concur with the statements of the case of both petitioners except as follows. With respect to the FPPC's statement:

1. Respondents disagree with the FPPC's characterization of the litigation below regarding Proposition 73's so-called "carry-over provisions." Cal. Gov't Code § 85306. FPPC Pet. at 7-8. Although Kopp and Johnson argued to the courts below that section 85306 would assure equal opportunity to challengers, their primary argument was that section 85306 would eliminate "corruption or the appearance of corruption." FPPC Pet. at A-82 n.8. Although the district court rejected Kopp and Johnson's level playing field argument, this was not the principal reason that the court struck down the provision. *See id.* at A-82 - A-86.

2. Respondents disagree with the FPPC's characterization of the basis for the lower courts' holdings regarding Proposition 73's contribution limits. The district court held Proposition 73's fiscal year contribution limits unconstitutional because it found that they actually discriminated against challengers. FPPC Pet. at A-60. The Ninth Circuit affirmed the district court's findings. *Id.* at A-12.

3. Respondents disagree with the FPPC's characterization of the basis for the Ninth Circuit's striking down Proposition 73's prohibition on transfers of campaign funds from one candidate's campaign committees to the committees of another, the so-called "inter-candidate" transfer ban. The Ninth Circuit struck down

the ban for two reasons. First, the ban did not serve the purpose of preventing contributors from circumventing the contribution limits because the contribution limits themselves had been declared unconstitutional. Second, the ban went beyond what was needed to serve the state's interest in preventing corruption or the appearance of corruption. *Id.* at A-24.

With respect to Kopp and Johnson's statement:

1. On August 3, 1989, Kopp and Johnson asked the Ninth Circuit by motion to suspend the district court's preliminary injunction entered on May 19, 1989. On October 2, 1989, the Ninth Circuit denied the motion.

2. Justice O'Connor denied the petitioner's first request for a stay to this Court on September 29, 1990, not September 30, 1990, as Kopp and Johnson state.

3. Petitioners requested an additional stay from Justice O'Connor on October 3, 1990, following the Ninth Circuit's denial of a stay. Justice O'Connor denied the request on October 4, 1990. As Kopp and Johnson state, the full Court denied Kopp and Johnson's further stay application on October 12, 1990.

REASONS FOR DENYING THE PETITION

Proposition 73 is a campaign finance scheme unique in American law. It limits contributions by *fiscal year* instead of by election, permitting early starters — almost always incumbents — to amass large sums of money but effectively prohibiting challengers from doing the same. The trial court found that challengers rarely surface early, and even when they do, they cannot attract financial support until close to the election when they are seen as credible candidates.

Proposition 73's fiscal year scheme would have allowed an incumbent elected to a four-year term in November 1990 to take $1,000 from a major contributor before July 1991; another $1,000 in fiscal year 1992; another $1,000 in fiscal 1993; and another $1,000 in fiscal 1994, all before the June 1994 primary. A typical challenger starting in the summer of 1993 could raise only $1,000 from a similar source. The challenger and the incumbent could

each take another $1,000 before the general election, reducing the state-mandated disparity only from 4-1 to 5-2. These are heavy odds. If Proposition 73 were like federal campaign law, such disparities would not exist.

The district court, after a full trial that produced 208 detailed findings of fact, enjoined Proposition 73's fiscal year scheme as a violation of the First and Fourteenth Amendments. On appeal, the Ninth Circuit affirmed the district court's decision.

Respondents have found no other campaign finance law in the nation like the fiscal year scheme of Proposition 73. Federal campaign law bases contribution limits on election cycles. No other state has a fiscal year scheme. And for good reason; in over three years of litigation, petitioners have been unable to assert any governmental interest that the fiscal year provisions themselves serve. *See* FPPC Pet. at A-20 n.13. Political science experts at trial offered nothing to commend this discriminatory fiscal year scheme over election cycle laws such as the federal model.

The FPPC and petitioners Kopp and Johnson ask this Court in separate petitions to review the Ninth Circuit's opinion below.[1] The dispute at the heart of this case is a factual one: did the district court properly find that Proposition 73's fiscal year contribution limit scheme discriminates against challengers? The FPPC asks this Court to embark on a third review of the record, after those of the district and circuit courts. This Court should refuse.

The FPPC's legal arguments and the arguments of Kopp and Johnson also do not warrant review. The petitions for certiorari challenge the district court's straightforward application of settled First Amendment principles to a particular set of facts. Petitioners point to no conflict between the circuits on any of the legal questions raised here. The petitions bring no untested issue to this Court. Three times petitioners have asked this Court or members of this Court to intervene by lifting the district court's injunctions.

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[1]The FPPC's petition is 91-1778. Kopp and Johnson's petition is 91-1787. Kopp and Johnson join in the FPPC's petition. Respondents oppose both petitions in this single brief.

Each time the Court has refused.[2] This Court should refuse once more.

Finally, the FPPC asks this Court to reverse and remand to the district court for reconsideration in light of Proposition 140, the initiative that instituted term limits for all California legislative and constitutional offices. The FPPC has offered nothing that undermines the district court's essential factual findings. Moreover, whatever the merits of the FPPC argument, petitioners may raise their claims before the district court, even after the judgment is final. *See* Fed. R. Civ. P. 60(b). The district court, intimately familiar with the factual record in this case, is best situated to determine whether petitioners can produce evidence that requires reversal of its judgment. Therefore, this Court should deny certiorari.

I

THE COURTS BELOW APPLIED THE CORRECT LEGAL STANDARD

The FPPC contends that this Court should summarily reverse the Ninth Circuit's decision because the court did not require respondents to prove intentional discrimination. FPPC Pet. at 9-10. But the cases upon which the FPPC rely demonstrate only that a showing of discriminatory intent is required when a statute is challenged on the ground that it affects a suspect class. *See City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 66-68 (1980); *Washington v. Davis*, 426 U.S. 229, 240-42 (1976).[3]

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[2]*See supra*. p. 3; Petition for Writ of Certiorari of Kopp and Johnson (hereinafter "Kopp Pet.") at 7-8. Petitioners also have asked the Ninth Circuit to intervene on three occasions and the district court to stay its orders twice. Each time the request was denied. *Id.*

[3] The FPPC points to the Court's use of the term "invidious discrimination" in *Buckley v. Valeo*, 424 U.S. 1, 31 (1976). Nothing in that case, however, imposes an intent requirement, nor does the term "invidious" connote intent. *Black's Law Dictionary* defines the term:

> Term "invidious" in context of claim that difference in treatment amounts to "invidious" discrimination in violation of the Four-

Proof of a First Amendment violation does not require a showing of intent. For example, earlier this term in *Simon & Schuster Inc. v. Members of the New York State Crime Victims Bd.*, 112 S. Ct. 501 (1991), the Court invalidated a New York law that required that a criminal's income from works describing the crime be deposited into a fund to pay victims of the crime and other creditors. *Id.* at 504-05. The Court found that the law violated the First Amendment because it financially burdened speakers based on the content of their speech and was not narrowly tailored to achieve a compelling state interest. *Id.* at 508-12. In so finding, the Court did not require proof that the state intended to suppress plaintiff's speech. The Court explained:

> [O]ur cases have consistently held that "[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment." [Plaintiff] need adduce "no evidence of improper censorial motive." ... "[W]e have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment."
>
> 112 S. Ct. at 509 (citations omitted).

See also Arkansas Writers' Project Inc. v. Ragland, 481 U.S. 221 (1987) (invalidating discriminatory tax scheme on first amendment grounds without requiring a showing of intent); *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983) (same).[4]

> teenth Amendment, means arbitrary, irrational and not reasonably related to a legitimate purpose.
>
> *Black's Law Dictionary*, p.826 (6th ed. 1990)

This Court's use of the word in other contexts has not necessarily expressed the concept of discriminatory intent. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 216 (1982) (footnotes omitted) ("Thus we have treated as presumptively invidious those classifications that disadvantage a 'suspect class' or that impinge upon the exercise of a 'fundamental right.'").

[4]The FPPC claims that *Minneapolis Star* and the other cases the Ninth Circuit relied upon are inapposite because each reviewed a statute that was discriminatory on its face. FPPC Pet. at 10 n.3. The FPPC is

Similarly, the Court has required no such finding of intent in First and Fourteenth Amendment cases concerning fundamental rights of political speech and association. *See, e.g., Norman v. Reed*, 112 S. Ct. 698, 705-06 (1992) (invalidating election law that impinged upon the right to create and develop new political parties without requiring showing of intent); *see also Anderson v. Celebrezze*, 460 U.S. 780, 789-90 (1983) (invalidating a statute imposing an early filing deadline for independent Presidential candidates without enquiring into intent); *Lubin v. Panish*, 415 U.S. 709, 715-18 (1974) (invalidating statute imposing mandatory filing fees for candidates to get their name on the ballot without enquiring into intent). The lower courts applied the correct legal standard.

II

THE COURTS BELOW PROPERLY FOUND THAT PROPOSITION 73 DISCRIMINATES AGAINST CHALLENGERS

The FPPC also asks this Court to review this case because it claims that the lower courts did not find that Proposition 73 actually discriminated against challengers. The FPPC claims that the lower courts found only that the fiscal year scheme "tends" to discriminate against challengers, that the lower courts were unable to explain how Proposition 73 discriminates against challengers, and that Proposition 73 actually benefits challengers. FPPC Pet. at 11-13.

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wrong. In cases involving discrimination against a suspect class, the violation of the Constitution lies in the fact that the government has treated a protected class differently *because* they are members of that class. In other words, the violation lies in the government's wrongful intent. However, the above-cited cases demonstrate that in cases involving a violation of First Amendment rights, the Constitution prohibits a burden on the exercise of those rights, whether intentional or not. It does not matter whether the burden on those rights is clear from the face of the statute, or merely arises from its effect. Instead, the violation lies in the simple loss of speech rights. *See Simon*, 112 S. Ct. at 509; *Arkansas Writers' Project*, 481 U.S. at 228; *Minneapolis Star*, 460 U.S. at 592.

In fact, the district court unquestionably found that Proposition 73 actually discriminated against challengers and violated the First Amendment. The district court stated:

> Proposition 73, in measuring the limitation on campaign contributions by fiscal year rather than election, unconstitutionally restricts free speech and favors incumbents against challengers, and must be found to violate the First and Fourteenth Amendments to the United States Constitution.
>
> FPPC Pet. at A-60.

After a thorough review of the record, the Ninth Circuit upheld the district court's findings:

> Thus, the testimony [at trial] provides ample evidentiary support for the district court's crucial finding that [P]roposition 73's fiscal year contribution limits discriminate against challengers as a class.
>
> *Id.* at A-12.

The district court received evidence at a six day bench trial.[5] *See id.* at A-5. In all, the court made 208 findings of fact and considered every request for findings made by the parties. See *Id.* at A-8 n.6. The Ninth Circuit exhaustively reviewed the record and the district court's findings. The findings of fact and the record clearly demonstrate that Proposition 73 discriminates against challengers.

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[5]The most compelling evidence came from two expert witnesses, Professor Gary Jacobson, the nation's pre-eminent scholar on federal campaign laws and their effect on challengers, and Professor Bruce Cain, the pre-eminent scholar on California political life. Professor Jacobson's testimony was based on his study of campaign finance and the fundraising patterns of incumbents and challengers in congressional elections. Professor Cain's testimony was based on his study of the area of campaign finance in general, and in particular on Plaintiffs' Trial Exhibit 6, a study of contribution patterns in recent California legislative and statewide races. FPPC Pet. at A-11.

The district court found that incumbents usually begin races with significant fundraising advantages over challengers.[6] Incumbents raise large amounts of money early and steadily.[7] Challengers do not.[8] Challengers depend on raising substantial sums of money just before an election.[9]

Proposition 73 grossly exacerbates the advantages of incumbency. For example, under Proposition 73, an incumbent candidate for a four-year office who started amassing funds immediately after his or her last election to the State Senate could return to each contributor five times before the next election.[10] However, Proposition 73 allows challengers at most two fiscal year periods to raise money.[11] The result is at least a five to two state-mandated fundraising advantage for incumbents.

The FPPC's argument that Proposition 73 actually benefits challengers makes no sense in this light. Even if Proposition 73 takes more money from incumbents than challengers in raw dollar

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[6]Finding of Fact Nos. 118, 132, 133 FPPC Pet. at A-107, A-110.

[7]Findings of Fact Nos. 80, 127, 128, 132, FPPC Pet. at A-101, A-109, A-110.

[8]Findings of Fact Nos. 74, 79, 129, 130, 133, 139, FPPC Pet. at A-101, A-109, A-110, A-111. The vast majority of challengers do not raise money in non-election years. Plaintiffs' Trial Exhibit 6, Appellees' Joint Supplemental Excerpts of Record (hereinafter "Appellees' Supp. Rec."), Tab B at 5-6. The keys to a challenger's success, such as an incumbent's vulnerability, are usually not evident until relatively close to an election. Findings of Fact No. 129, FPPC Pet. at A-109.

[9]This means that challengers must obtain large contributions from individual contributors, PACs, and other, more established candidates. Findings of Fact Nos. 107, 127, 139, 140, FPPC Pet. at A-106, A-109, A-111.

[10] Reporter's Transcript (hereinafter "RT") at 419-20. This translates into $5,000 from each individual contributor, $12,500 from each small PAC, and $25,000 from each broad-based PAC.

[11] RT at 418-19. As a result, the challenger could receive at most $2,000 from each individual contributor, $5,000 from each small PAC, and $10,000 from each broad-based PAC.

terms, it creates an overwhelming disadvantage for challengers at a critical level of fundraising. Proposition 73 deprives challengers of highly valuable funds but takes only excess funds of relatively low marginal value from incumbents.[12] Furthermore, the record contains ample evidence to conclude that Proposition 73 would take more from challengers than incumbents in raw dollars terms in races where it counts. The district court found that in competitive races, challengers, not incumbents, benefited more from contributions in excess of Proposition 73's limits.[13]

The trial court's factual findings are, of course, entitled to deference, and will be set aside by a reviewing court only if "clearly erroneous." Fed. R. Civ. P. 52(a); *see, e.g., Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573-74 (1985). The Ninth Circuit upheld the district court's findings after thorough review. *See* FPPC Pet. at A-8 - A-13. This Court should not review the findings again. *See, e.g., Graver Tank & Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949) (this Court "rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.").

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[12] *See* Findings of Fact Nos. 125-26, FPPC Pet. at A-109.

[13] Finding of Fact No. 140, FPPC Pet. at A-111. This finding was based on Plaintiffs' Trial Exhibit 17. Appellees' Supp. Rec., Tab D (hereinafter "Exh. 17"). In preparing Exhibit 17, Professor Cain culled all competitive races for the California Legislature in 1988, before Proposition 73 took effect. RT at 426. He examined the funds collected by both challengers and incumbents to determine when the funds were collected, whether they were transfers from other candidates or contributions, and how much candidates received from contributions that would have exceeded Proposition 73's limits. RT at 424-26, 435-36. Professor Cain found that, in six of the eight competitive races studied, it was challengers — not incumbents — who benefitted more from contributions in excess of Proposition 73 limits. RT at 432-36, 442; Exh. 17, Table I. And the vast majority of the excess contributions challengers received came after the primary election. Exh. 17, Table I. Very few of those challengers raised more than a negligible amount of funds prior to the primary. *Id.*

III

THE LOWER COURTS' INVALIDATION OF PROPOSITION 73'S PROHIBITIONS ON THE USE OF CAMPAIGN FUNDS PROVIDES NO BASIS FOR CERTIORARI

In addition to its core fiscal year contribution limits, Proposition 73 contained three separate prohibitions on the use to which campaign funds could be put. It prohibited transfers of funds between separate campaign committees of a candidate, for example, between that candidate's State Assembly committee and his or her committee for statewide office. It prohibited transfers of funds from one candidate to another or between ballot measure committees and candidates. And it prohibited altogether the use of campaign funds raised before the effective date of Proposition 73 for the very political purposes for which the money had been raised, waging a campaign for elective office.

The courts below properly struck down these bans.

A. Intra-Candidate Transfer Ban

Proposition 73 prohibits so-called "intra-candidate" transfers, transfers of campaign funds between a candidate's own campaign committees.[14] Petitioner asks this Court to grant review of this case to resolve what it terms the "important question" of whether such a transfer ban is an "expenditure" limitation. FPPC Pet. at 20-21.

The intra-candidate transfer ban is clearly an expenditure limit. Put simply, it prevents a candidate from spending lawfully raised money to enhance the candidate's prospects for winning an election. The FPPC devoted so little attention to the issue in its briefing before the Ninth Circuit that the appellate court did not even understand that the FPPC contended that the intra-candidate transfer ban was not an expenditure limitation. *See* FPPC Pet. at A-22 n.17 ("Appellants do not appear to dispute that the intra-candidate transfer ban operates as an expenditure limitation.").

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[14]Cal. Gov't Code §§ 85200, 85201, 85202(b), 85304.

Petitioners Kopp and Johnson complain that the Ninth Circuit failed to recognize a state interest in "assuring campaign contributors that funds contributed would not be raised for one office and spent for another" to justify the ban. Kopp Pet. at 23. The Ninth Circuit, however, found that even if the interest were compelling, the intra-candidate transfer ban was not narrowly tailored to achieve this purpose. FPPC Pet. at A-23. The Ninth Circuit held that the interest "could be [served] simply by requiring candidates to inform contributors that their contributions might be spent on other races." *Id.* at A-23.[15]

Petitioner has pointed to no conflict in the federal circuits or the states regarding whether intra-candidate transfer bans are expenditure limits. Indeed, federal law contains no intra-candidate transfer bans.[16]

B. Inter-Candidate Transfer Ban

Proposition 73 also prohibits so-called "inter-candidate" transfers — transfers of campaign funds from one candidate's campaign committees to the committees of another.[17] The FPPC asks this Court to determine whether such a ban is narrowly tailored to serve the compelling state interest of preventing corruption or the appearance of corruption.

The FPPC argued before the Ninth Circuit that the inter-candidate transfer ban was necessary to prevent contributors from circumventing the contribution limits. FPPC Pet. at A-24. The Ninth Circuit upheld the district court's invalidation of the

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[15]*See also id.* (quoting *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 261 (1986)) ("Concerns about the unintended use of contributors' money can be met 'by means far more narrowly tailored and less burdensome than [a] restriction on direct expenditures: simply requiring that contributors be informed that their money may be used for such a purpose.' ").

[16]Federal campaign law permits a candidate to transfer funds from a campaign fund for one office to another and to carry over funds from one election to another. RT 312, 348.

[17]Cal. Gov't Code § 85304.

transfer ban because the ban could not serve this purpose given that the contribution limits based on the fiscal year structure were unconstitutional. *Id.*

The FPPC now contends that the inter-candidate transfer ban is narrowly drawn to further the State's interest in preventing corruption or the appearance of corruption arising from large contributions made by the leadership of the state legislature. Kopp and Johnson made essentially the same argument before the Ninth Circuit. The Ninth Circuit rejected the argument because Proposition 73's inter-candidate transfer ban flatly prohibits all transfers, whether large or small. FPPC Pet. at A-24 - A-25. The ban plainly goes far beyond what is needed to address the potential for corruption that derives only from large contributions, not small ones. *Id.* The FPPC offers no reason why the Ninth Circuit's reasoning is infirm.[18]

This issue does not warrant review. Petitioner has pointed to no conflict in the circuit courts on the matter. Indeed, federal law contains no such inter-candidate transfer ban.[19]

C. The Carryover Ban

Finally, petitioners Kopp and Johnson ask this court to grant certiorari to review the lower courts' invalidation of Proposition 73's so-called "carryover ban." Proposition 73 prohibited candidates from spending funds raised prior to January 1, 1989 to

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[18]Kopp and Johnson also attempt to justify the inter-candidate transfer ban on the grounds that it prevents "last minute transfers" of money that have affected electoral outcomes. Kopp Pet. at 24. They argue that the ban promotes "challenger participation in the political marketplace." *Id.* However, as explained above, *see supra* at p. 9, these large transfers are vital for challengers to be able to compete against incumbents. *See also* Finding of Fact No. 141, FPPC Pet. at A-111. Moreover, this is the level playing field argument, soundly rejected by the Court in *Buckley*, 424 U.S. 1, 48-49 (1976) ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.").

[19]Federal campaign law permits a candidate to form a PAC and contribute subject to the limits imposed on other PACs. RT 311.

support or oppose a candidacy for elected office. Cal. Gov't Code § 85306. The prohibition applied whether or not funds were raised within limits imposed by Proposition 73. The Ninth Circuit correctly held that the ban served no compelling purpose given that Proposition 73's contribution limits were invalid. *See* FPPC Pet. at A-25.

Moreover, the issue is almost certainly moot. Since the carryover ban was enjoined on September 14, 1989, California has held three statewide elections, and cities, counties, school districts, and other local entities have held numerous other elections. It is virtually certain that no funds raised before January 1, 1989 remain in candidates' accounts.

The constitutionality of Proposition 73's carryover ban is certainly not an issue that warrants review. The FPPC did not even appeal the district court's invalidation of the carryover ban to the Ninth Circuit. FPPC Pet. at A-25. The federal system has no such carryover ban. Petitioner has identified, and we are aware of, no other state that has such a ban. Petitioner has cited no conflict in the federal circuits or the states that this Court should resolve.

IV

THE CHANGES CAUSED BY PROPOSITION 140 DO NOT WARRANT CERTIORARI

Finally, the FPPC asks this Court to grant certiorari, reverse the judgment below and remand to the district court for further consideration in light of Proposition 140. The FPPC asserts that Proposition 140, the initiative that limited the number of terms a person may serve in a California legislative or constitutional office, so altered the political landscape of California that "the relationship between fundraising and challenges to an incumbent officeholder" is now "a matter of pure conjecture." FPPC Pet. at 14.[20]

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[20]As the FPPC states, this Court denied certiorari on the state court challenge to Proposition 140 on March 9, 1992, after the Ninth Circuit decided petitioner's appeal in this case. FPPC Pet. at 14; *see Legislature v. Eu*, 54 Cal.3d 492 (1991), *cert. denied* 112 S. Ct. 1292 (1992).

This Court should deny the FPPC's request. Nothing the FPPC offers undermines the lower courts' central conclusion that Proposition 73's fiscal year contribution limit scheme unconstitutionally discriminates against challengers. Even under Proposition 140, many well-funded incumbent officeholders will seek re-election, and many under-funded challengers, dependent upon obtaining large amounts of money late in the race, will try to unseat them. In many cases, Proposition 73 would work the same discrimination against challengers because it would still permit incumbents to raise sufficient money to finance their campaigns but deny challengers an equal opportunity to reach the threshold they need.

The FPPC offers only conjecture about the effect of Proposition 140 on Proposition 73's fiscal year contribution limit scheme. This speculation does not provide the basis for reversing the lower courts' decisions, made after exhaustive argument, consideration, and review.[21] The issues petitioner raises are complex factual matters. For example, determining the effect of Proposition 140 on the discrimination Proposition 73 works against challengers would require complex statistical data and expert opinion regarding political fundraising. A court would need to determine such matters as threshold amounts of money challengers need to mount viable campaigns, the effect of Proposition 140 on the power of incumbency, and the fundraising needs and capabilities of challengers and incumbents.

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[21]Indeed the cases upon which the FPPC relies do not support granting certiorari where petitioner offers mere speculation regarding the effect of an intervening state law on the factual record upon which the lower courts based their holdings. In *Omaha Nat'l. Bank v. Nebraskans Indep. Banking*, 426 U.S. 310 (1976), the Court reversed and remanded the case in light of intervening state legislation that redefined a term that was key to the lower court's holding. *Id.* at 310-11. Unlike here, the case involved a clear change in state law that appeared to have straightforward implications for the decision for which certiorari was sought. In *Bureau of Economic Analysis v. Long*, 454 U.S. 934 (1981), the Court without explanation vacated and remanded the case in light of the Economic Recovery Tax Act of 1981. Nothing in the order suggested that changed factual circumstances served as the basis for the decision.

Whether the FPPC can produce evidence that justifies reversal or modification of the district court's decision is a factual determination that the district court, not this Court, should make in the first instance. The district court is intimately familiar with the factual record of this case after conducting the six day trial and reviewing the record to make its 208 factual findings.

The Federal Rules of Civil Procedure permit the FPPC to pursue this matter in the district court, even after final judgment, through a motion for relief from the judgment under Rule 60(b). Rule 60(b) provides in relevant part:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment [if] (5) . . . it is no longer equitable that the judgment should have prospective application; or (6) any other reason justif[ies] relief from the operation of the judgment.
>
> Fed. R. Civ. P. 60(b).[22]

The district court may modify or revoke a final, permanent injunction when a "significant change in circumstances warrants revision . . . ." *Rufo v. Inmates of the Suffolk County Jail*, 112 S. Ct. 748, 760 (1992); *see also Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 437, 440 (1976); *System Fed'n No. 91, Railway Employees' Dep't v. Wright*, 364 U.S. 642, 646-48 (1961); *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932). This Court has observed that the district court "is in a much better position to pass upon the issues presented in a motion pursuant to Rule 60(b)." *Standard Oil Co. of California v. United States*, 429 U.S. 17, 19 (1976) (quoting *Wilkin v. Sunbeam Corp.*, 405 F.2d 165, 166 (10th Cir. 1968)). In *Standard Oil*, this Court held that a district court may entertain a Rule 60(b) motion without this Court's leave. *Id.* at 17. Indeed, "the place to make a record is the district court and not the appellate court." *Wilkin*, 405 F.2d at 166.

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[22]The motion must be made "within a reasonable time" and "does not affect the finality of a judgment or suspend its operation." Fed. R. Civ. P. 60(b).

If the FPPC feels a Rule 60(b) motion is appropriate, it can make that motion. There is no need for this Court to grant certiorari and remand.

CONCLUSION

The petitions for certiorari should be denied.

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Respectfully submitted,

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